No. 392

In The Supreme Court of The United States

OCTOBER TERM, 1947

FRANK R. CREEDON, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER,
Petitioner,

v.

CHARLES STONE,
Respondent.

BRIEF OF RESPONDENT

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CITATIONS

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MATTER ACCEPTED

Petitioner's statement as to the jurisdiction of this court and as to the statute and regulation involved are accepted.

QUESTION PRESENTED

Respondent agrees that the question to be presented is as stated in Petitioner's Brief.

STATEMENT

Respondent accepts the statement as set forth in Petitioner's Brief, suggesting, however, the following addition:

The premises were not registered for the reason that respondent did not believe that he was required to register them under the rules and regulations, claiming that there was no rental agreement.

SPECIFICATION OF ERROR TO BE URGED

Respondent accepts the specification of error to be urged as set forth in Petitioner's Brief,, claiming, however, that there was no error.

Note: It was the position of respondent in the Circuit Court of Appeals that the Rent Director had no authority to make a retroactive order; however, in view of the ruling of the Supreme Court that certiorari was granted only for the purpose of testing out the legal question as to the statute of limitations, we do not in this brief urge the question. If this court would desire or accept argument on the question, respondent would like to brief the question for the court.

SUMMARY OF ARGUMENT

A reading of the Act, giving the ordinary meaning to the words of the Act, without attempting to strain them, clearly indicates that when the Legislature limited the bringing of an action "within one year from the date of the occurrance of the violation * * * on account of the overcharge," they meant the limitation period to begin to run from the time of the overcharge, or the actual taking of the rent, and did not mean to provide different meanings to the words "overcharge" and "violation," the word "overcharge" meant to define the word "violation".

ARGUMENT

(Emphasis herein is always ours unless otherwise indicated)

SEC. 205(e) OR 925(e) OF THE EMERGENCY PRICE CONTROL ACT CLEARLY INDICATES THAT THE WORDS "VIOLATION" AND "OVERCHARGE" ARE SYNONOMOUS, ONE DEFINING THE OTHER

Section 205(e) or 925(e) of the Emergency Price Control Act involved in this case, as applicable, reads as follows:

> "If any person *selling* a commodity violates a regulation order or price schedule prescribing a maximum price the person who buys such commodity * * * *may within one year of the date of the occurrence of the violation* * * * bring an action against the seller on account of the *overcharge* * * * that the judgment shall be not more than three times the amount of the overcharge, or overcharges * * * for the purposes of this section the * * * *receipt of rent* for defense * * * housing shall be deemed the * * * *selling of a commodity* * * * Overcharge shall mean the amount by which the consideration exceeds the applicable maximum price. (Rent)".

In this case, we are dealing with *"the receipt of rent"*. So the term in the statute "maximum price" is changed to "maximum rent," and the word "price" is changed to "rent". This statute gives a *right of action only,* as stated in said statute, *"on account of the overcharge."* The first question is, how and when does the overcharge occur? The obvious answer, from the statute when read in the ordinary sense, is, by and when a person *receiving rent* violates (note present tense) a regulation, order or rent schedule *"prescribing a maximum rent."* In other words, when a person receives rent *over* the rent permitted, he is guilty of "the violation" of the "maximum rent" regula-

tion, order or schedule; and it is this violation which causes and/or results in the overcharge. The refund order in question here does not prescribe a maximum rent, so its violation does not and cannot cause and/or result in "the overcharge".

The Administrator complicates the statute by his confused construction of what is meant by the phrase in the statute, "The date of the occurrence of the violation". This phrase can only mean the date when the violation occurs, the date when a person receives rent in excess of the permitted maximum rent, which causes the overcharge of rent, and that is the sole basis of this action. The Court, in the case of *Porter vs. Stone,* 72 Fed. Supp. 306 clearly and succintly recognized this argument, when they said:

> "It is upon overcharges of $30.00 per month that the action is based, not on a single overcharge of $270.00. Plaintiff is here seeking to recover damages under U. S. C. A. 50 App. 925(e). That section '* * * established the sole means * * * whereby the Administrator on behalf of the United States may seek damages in the nature of penalty.' *Porter vs. Warner Holding Company,* 328 U. S. 395. The evident plan of that section is to give a right to damages for each overcharge. *Gilbert vs. Thierry,* 58 F. Supp. 235 and authorities cited therein. The trouble with plaintiff's position is that it confuses the obligation of the landlord to refund, or make restitution, with the obligation to respond in damages. The former obligation exists only by virtue of Section 4(e) of the Rent Regulation for Housing. U. S. C. A. 50 App. 925(e) imposes no obligation to refund or make restitution but only to respond in damages under certain conditions. It may well be that by virtue of the holding of the Supreme Court in *Porter vs. Warner Holding Company,* supra, plaintiff could enforce such a refund

order by appropriate action under Section 925(a). This action, however, is based on Section 925(e) and 'the time limitation expressed in 205(e) 925 (e) operates as a limitation of the liability itself as created * * *' *Bowles vs. American Distilling Company*, 62 F. Supp. 20, 22. For this reason the court has jurisdiction to award damages under Section 925(e) only as to overcharges occurring one year prior to the filing of the action. *Bowles vs. Gulf Refining Company*, 61 F. Supp. 149; *Bowles vs. American Distilling Company*, supra; *Thompson vs. Taylor*, 62 F. Supp. 930. Plaintiff is entitled to recover, therefore, only for the three months of February, March and April of 1945."

The one year period here is a statute of creation and not a statute of limitation. It is an inherent part of the right to sue at all. This contention is fully discussed in *Makeny vs. Porter*, 158 Fed. 2nd, ~~393~~ 478

Carmady vs. Hanson, 43 Atlantic 2d, 685.

Midstate Horticultural Corp. vs. Penn Ry., 320 U. S. 356.

Bowles vs. American Distilling Company, 62 Fed. Sup. 20.

Bowles vs. Olsen, 151 Pac. 2nd 723.

Creedon vs. Stone, 168 Fed. 2nd 393, affirming *Porter vs. Stone*, 72 Fed. Sup. 306.

Makeny vs. Porter, 158 Fed. 2nd 478, supported by decisions from the U. S. Supreme Court cited therein.

Thompson vs. Taylor, 62 Fed. Sup. 630.

34 American Juris 17, and numerous cases cited.

CONTENTION OF PETITIONER

Petitioner contends in its brief that the decision of the lower court affords a benefit to those who compound their violation by failing to file a registration statement, and would allow "a wrongdoer to benefit by his own wrong", arguing that a landlord could fail to register and collect rent in excess of the maximum allowable rent, and then avoid repayment of the overcharge, if he could conceal the lack of registration for a period of a year.

This contention is unsound for the reason that every tenant under the Act could very easily check the registration, or notify the rent director that the property was not registered.

We must bear in mind that the Act provides:

> "'If a landlord fails to file a proper registration statement within the time specified * * * the rent received for any rental period commencing on or after the date of the first renting * * * shall be received subject to refund to the tenant of any amount in excess of the maximum which may later be fixed by an order under section 5(c). Such amount shall be refunded to the tenant within thirty days after the date of the issuance of the order * * *"

Obviously, the tenant or the rent director could very seasonably check the registration and institute proceedings either by the tenant or the director to recover the refund.

MAXIMUM RENT ORDER

We are met with the contention that the overcharge did not occur on the date when the rent was received because

there was no regulation, order or rent schedule permitting and/or prescribing a "maximum rent" in effect on that date. This contention is answered by the fact that the administrator pursuant to rent regulation 5.C.1. made a maximum rent order *retroactively effective* from March 1, 1944, since which date all rent herein was received. Now, if this order is valid, and effective, and appellant contends it is, said maximum rent order was in effect while all the rent herein was received. It is the violation of this effective retroactive maximum rent order that gives rise to the overcharges of $30.00 per month, which is the basis of this action.

THE REFUND ORDER

When the administrator made his retroactve rent order under regulaton 5.C.1, he made a further order, a *refund order* under regulation 4.E. It is obvious that this refund order does not prescribe a maximum rent, and therefore its violation does not create an overcharge, and 925(e) does not provide for the enforcement of this refund order. The action here is not one to enforce *the refund order*.

By section 925(e), Congress vested our courts with exclusive jurisdiction to construe said section and enforce the respective rights of parties litigant under it, to determine the extent of the overcharges and whether treble damages should be imposed. By regulation 4.E., the administrator vests himself with the power in his discretion to forgive all penalties and all overcharges, and to extend the one year period and create a new liability not provided for in the statute, viz: That all *overcharges found due* by him from August 1, 1944, the time of the first effective rent date, wthout penaltes be repaid, as between 925(e) of the statute, and regulation 4.E., 925(e) must prevail.

THE ONE YEAR PERIOD RUNS FROM THE TIME RENT IS PAID

When 925(e) was first enacted in 1942, Congress showed its specific intent by specifically providing therein that suit shall be instituted "within one year after the delivery is completed or *rent is paid.*" In the amendment of 1944, the latter quoted phrase was changed to read, "within one year of the date of the occurrence of the violation." The evident purpose of the change was to include in one statement both a sale and rent, since these words are made synonymous by the statute. If Congress does not so specifically provide the language of the statute as amended clearly shows that the one year period was to run from the date of the overcharge when the person receives rent over the rent permitted. The report of the Senate Committee on Banking and Currency, whch reported the 1944 amendment and ts purpose, Sen. Rep. No. 922, 78th Congress, 2d Session, Page 3, being silent on the question, shows that Congress in the 1944 amendment had no intent to change its original intention that the one year period runs from the date when rent is paid.

THE CONFLICT IN THE DECISIONS

Petitioner cited the greater number of decisions in its favor, and claims the weight of authority. These decisions, all but two, are by United States District Courts.

Creedon vs. Stone, 163 Fed. 2d, 393, Sixth Circuit, was decided before *Creedon vs. Babcock,* 163 Fed. 2d, 480. However, *Creedon vs. Stone* was not cited in defendant's briefs or considered, in *Creedon vs. Babcock.* The Babcock decision relied on the authority of *Porter vs. Butts,*

68 Fed. Supp. 516, and *Parkham vs. Clark,* 68 Fed. Supp. 17, both of which cases arose in the Sixth Circuit and were already overruled and no longer the law by reason of the decision in *Creedon vs. Stone,* Sixth Circuit.

Porter vs. Butts is cited in all the decisions. It was published. *Porter vs. Stone,* 72 Fed. Supp. 306, was decided before *Porter vs. Butts,* but was not published until after the decision in *Creedon vs. Stone,* and *Creedon vs. Babcock.* In weighing the decisions there are some practical considerations. The defendants involved in these cases are small fry, and because of the trivial amount of money involved ranging well under $500.00, for instance, $270.00 in the Stone case and $360.00 in the Babcock case, it is reasonable to assume that these defendants could not afford to adequately compensate counsel to spend the necessary time to analyze this new legislation and efficiently present the defendant's case to the Courts. On the other hand, the Administrator was well equipped with a competent, paid legal staff with sufficient time to analyze the legislation and efficiently present the administrator's view points thereon. This undoubtedly was a factor in many of the decisions and it is reasonable to assume that one decision begets another. Once the Butts case was decided, it became and was cited as authority.

PETITIONER'S ARGUMENT

Petitioner presents a confused argument as to the difference between the words "violation" and "overcharge" as used in the statute, viz: that "violation" was used as indicating the point from which the statute begins to run, and "overcharge" as indicating the basis for the partial measure of damages in the action. This is a meaningless

argument. The action here is "on account of the overcharge".

Much of Petitioner's confusion arises in an attempt to apply the one year period as an ordinary statute of limitations, that the time could not start to run against an action until the action could be instituted. However, the one year period here is not a statute of limitations. It is an inherent part of the right to sue, *"the commencement of the action within the time is an indispensible condition of the liability * * * when the period fixed by its terms has run, the substantive right and the corresponding liability end."* *Makeny vs. Porter,* 158 Fed. 2nd, 478.

At this point we desire to call the attention of the court to the language of section 205(e) or 925(e), paraphrased to suit the instant case, which reads:

> "If any person renting premises violates a regulation, order or rent schedule *prescribing a maximum rental,* the tenant may within one year of the date of the occurrence of the violation * * * bring an action against the seller on account of the overcharge."

From the time of the issuance of the refund order in the instant case, no rental was accepted by the respondent in excess of the reduced rental prescribed by the refund order. Respondent did not violate a "regulation, order or price schedule *prescribing a maximum price* (rental)." The only violation, if any, of which respondent may have been guilty, is that he did not refund any rent previously collected. This was not a maximum price regulation. In this connection we must bear in mind that even under respondent's interpretation of the law, the tenant could have brought his action on June 29, 1945, and recovered the full amount of the overcharge (assuming the rent di-

rector had authority to make such a retroactive refund order, which is denied); and if it were determined that the failure to register was willful, could have recovered treble damages; or the director could have instituted proceedings on July 29, 1945, *and still recovered the full amount of the overcharged rent.* Certainly because the rent director chose to wait from July 29, 1945 until February 1, 1946, to institute proceedings, does not warrant penalizing respondent.

It must be borne in mind that this action by the director under section 4.E. of the Act is for the benefit of the government, as damages in the nature of a penalty; *Foster vs. Warner Holding Company,* 328 U. S. 395, 401-402; and is not for the benefit of the tenant, for the tenant would receive no part of the recovery, if any. A reading of the entire Act would indicate it was primarily for the benefit of the tenant, to prevent rent gouging, and when Congress authorized the institution of proceedings for the recovery of excess rental, they were primarily concerned with the rights of the tenant, and never intended to pass legislation which would bring money into the coffers of the United States Treasury. This was not a money raising enterprise for the Treasury.

CONCLUSION

We therefore respectfully submit that the one year period runs from the date when rent is paid and/or received; when rent is received over the amount permitted; when the overcharge is made. That from the time of the refund order, no excess rental was paid to or received by respondent. That the violation of the refund order, in the language of *Creedon vs. Stone,* "is not the violation

specified in 205(e)". That the decision herein should be affirmed.

Respectfully submitted,

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ADDENDUM

After writing this brief, the case of *Markbreiter et al vs. Woods, Acting Housing Expediter,* 163 F. 2d 993, decided in the United States Emergency Court of Appeals on November 6, 1947, was called to our attention. In that case, the Emergency Court of Appeals held that a rent director's order fixing rental and making same retroactive was invalid and void.

This order was made on the initiative of the rent director.

It is true that the order in this case was not made because the landlord had failed to register, but was brought under section 5(d) of the rent regulation. Nevertheless, the court said that such retroactive order was invalid for the reason that section 5(d) of the rent regulation does not authorize the administrator to fix maximum rents retroactively. The same reasoning should apply to the instant case, inasmuch as there is nothing in the Act as it applies to the instant case which authorizes the rent director to make a retroactive order.

It is true that by the limitation of the Supreme Court in granting certiorari, as we pointed out in our brief, the only question to be determined on this hearing is the effect of the statute of limitations. Nevertheless, we feel that this case should be called to the attention of this court in the event the court wishes to consider it.